

In the Matter of:	:	
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Elva and Gilbert Loera,	:	HUDBCA No. 03-A-CH-AWG28
	:	Claim No. 78-048419-9
Petitioners	:	
	:	

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Pro se

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For the Secretary

DECISION ON ADMINISTRATIVE WAGE GARNISHMENT

Petitioners requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD"). This alleged debt resulted from a defaulted loan which was insured against non-payment by the Secretary of HUD. The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes Federal agencies to utilize administrative wage garnishment as a remedy for the collection of debts owed to the United States Government.

The administrative judges of this Board have been designated to determine whether this debt is past-due and enforceable against Petitioners and, if so, whether the Secretary may collect the alleged debt by administrative wage garnishment. 24 C.F.R. § 17.170(b). This hearing was conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. The Secretary has

the initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11(f)(8)(i). Petitioners thereafter must present by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, Petitioners may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the Petitioners, or that collection of the debt may not be pursued due to operation of law. 31 C.F.R. § 285.11(f)(8)(ii). Pursuant to 31 C.F.R. § 285.11(f)(10)(i), issuance of a wage withholding order was stayed until the issuance of this written decision.

Summary of Facts and Discussion

On July 23, 1996, Petitioners executed and delivered to Alta Loma Financial Corporation, a home improvement loan in the amount of \$25,000.00 that was insured against nonpayment by the Secretary pursuant to the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement, hereinafter "Secy. Stat.," Exh. A). Thereafter, Alta Loma Financial Corporation assigned the note to First National Bank of Keystone. Petitioners failed to make payments as agreed to on the note. (Secy. Stat., para. 2). On March 21, 2002, First National Bank of Keystone assigned the note to the United States of America in accordance with 24 C.F.R. §201.54. (Secy. Stat., unmarked exh.). The Secretary is the holder of the note on behalf of the United States. Id.

In response to the Board's Order of September 12, 2003, the Secretary admitted errors in the amount originally alleged as the unpaid principal balance of \$5,737.78 and now asserts that Petitioners are indebted to the Secretary in the following amounts: \$4,582.57 as the unpaid principal balance as of September 30, 2003; \$566.44 as the unpaid interest on the principal balance at 5% per annum through September 30, 2003; \$191.81 as the Treasury Department Management Services ("DMS") fee; \$1,598.39 as the private collection agency ("PCA") fee; and the interest on said principal balance from October 1, 2003 until paid at 5% per annum. (Secretary's Response to Order, Supplemental Declaration of Brian M. Dillon, para. 3-4; Secy. Stat. Exh. B, Declaration of Glen Goodman, para. 4(c) and 4(d).

This Board has previously found this debt due and owing. See *In the Matter of Gilbert M. Loera*, HUDBCA No. 02-C-CH-CC065 (December 23, 2002). Although this Board in that case authorized the Secretary to collect the debt by means of administrative offset, the Secretary is not precluded from

collecting this debt by means of administrative wage garnishment.

Petitioners do not dispute the existence of the debt. Rather, Petitioners dispute the interest, penalties and the proposed repayment schedule. Petitioners "believe that [they] do not owe the entire debt and if so, that [they] should not be liable for the penalties and interest." (Petitioners Statement dated September 8, 2003, para. 8). As discussed above, Petitioners are not accountable for the entire amount the Secretary originally alleged and are responsible for repayment of the Secretary's revised amount totaling \$4,582.57 and all interest charges authorized by law.

Petitioners are responsible for the accumulated interest on the note by the terms of the Deed of Trust, which secured the loan. Section Seven of the Deed of Trust, signed by Petitioners, states that if the Lender takes action due to the Borrowers failure to perform on the note:

Any amounts disbursed by Lender pursuant to this paragraph 7, **with interest thereon, at the Note rate, shall become additional indebtedness of Borrower** secured by this Deed of Trust. (Secretary's Answer to Order, Exh. A, Deed of Trust §7, emphasis added).

When the Petitioners defaulted on the Note, the Holder of the Note accelerated payment in accordance with Section 17 of the Deed of Trust. (Secretary's Answer to Order, para. 8; Exh. A, Deed of Trust §17). This Board finds that because the loan amount is due in full as a result of the Petitioners' default, they are responsible for the accumulated interest on the note.

Petitioners assert that payment arrangements should be made and not a wage garnishment as it would create a "financial hardship on [their] family." (Petitioners Statement, hereinafter "Pet. Stat." para. 8). The Secretary may request the United States Department of the Treasury issue a wage withholding order to Petitioners' employer's directing those employers to withhold an amount up to 15% of Petitioners' disposable pay. (31 C.F.R. § 285 (i)(2)(i)(A)). Petitioners are entitled to submit evidence that the repayment of this loan in the manner proposed by the Secretary would create a financial hardship. (31 C.F.R. § 285.11 (f)(8)(ii)). Attached to the Petitioners' letter were various documents including a pay stub and bills. Petitioners' monthly bills documented expenses that

amounted to \$2,832.31 monthly. Those expenses include a mortgage payment, \$1,689.34; Credit Counseling Center of America, \$916.00; water and power, \$35.65; gas, \$38.58; cable, \$26.43; and three phone lines, \$126.40. (Pet. Stat., unmarked exhibits). Petitioners' Statement lists other monthly expenses for which bills were not submitted. These expenses amount to \$2,123.00 which include IRS monthly payment, \$100.00; life insurance, \$55.00; home insurance, \$65.00; car insurance, \$198.00; water company, \$250.00; gasoline, \$80.00; groceries, \$400.00; tuition, \$545.00; cleaners, \$30.00; lunch money, \$150.00; entertainment, \$75.00; miscellaneous, \$75.00; and clothing, \$100.00. (Pet. Stat.). Consequently, Petitioners claim that the amount of their monthly expenses total \$4,955.40.

I find that the financial information submitted by Petitioners are generally credible, although the averages of monthly living expenses appear to be somewhat overstated. Petitioners claim in their statement that their monthly water costs amounts to \$250.00 per month, whereas the bill they submitted from the City of Los Angeles Municipal Services for winter water use amounts to \$35.65. The information on the mortgage and loan payment statements are specific, not estimated, as was the cable, gas, and phone bills. (Pet. Stat., unmarked exhibits). Although the Petitioner has not proposed a rate of garnishment as an alternative to the Secretary's proposed garnishment, the Board has the authority to order garnishment at a lesser rate based upon the record before it. (24 C.F.R. 17.170(b); 31 C.F.R. 285.11(f)(11)(ii) and (iii)). Petitioners' monthly disposable income of \$3,938.18 is less than their alleged monthly expenses of \$4,955.31. Any garnishment would further reduce Petitioners disposable income to an amount below their alleged monthly expenses.

Petitioners submitted a document entitled "Settlement Statement." (Pet. Stat., unmarked exhibit). However, Petitioners did not discuss the significance of that document, which appears to indicate that, on August 10, 1998, Petitioners sold the piece of property which was improved by the proceeds from this loan. While the relevancy of this evidence is questionable, the Board finds that the debt at issue remains past due and enforceable because there is no evidence that the lender waived its rights to full repayment pursuant to the terms of the loan document. To prove a lender waived its rights under the loan, there must be either (1) a release in writing from the lender specifically discharging Petitioner's obligation or (2) valuable consideration accepted by the lender from the Petitioner, which would indicate the intent to release. Jo Dean

Wilson, HUDBCA No. 02-A-CH-AWG09 (January 30, 2003).

Petitioners have submitted no evidence to establish an intent on the part of the lender to release Petitioners from their obligation to repay this debt. Therefore, the Secretary may enforce the obligation in full against Petitioners.

Petitioners may wish to negotiate repayment terms with the Department. However, this Board is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department. Petitioners may wish to discuss this matter with Lester J. West, Director, HUD Albany Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121. His telephone number is 1-800-669-5152, extension 4206. Petitioners may also request a review of his financial status by submitting to that HUD Office a Title I Financial Statement (HUD Form 56142).

Petitioners request that the Board issue a Stay on all collection proceedings until the Board makes a decision. Specifically the Petitioners request:

The assistance of the [Board]
to order the U.S. Department of
Treasury-FMS, Ocwen Federal Bank
and their affiliates to immediately
stop all collection proceedings
regarding the above-mentioned matter
until a decision from the [Board] is
received and the matter has been
finalized . . . While this matter
is pending before [the Board] the
[Department of Treasury has] issued
[to the Petitioners] a wage garnishment
letter for the exact same amount. (Petitioners'
Statement dated November 19, 2003).

The Board issued a Stay of Issuance on the above referenced debt on July 28, 2003. Specifically the Board stated that the "issuance of a wage withholding order to satisfy the alleged debt of Petitioners is stayed until the issuance of a written decision by the Board in this matter unless a wage withholding order has previously been issued in this matter." (Notice of Docketing, Order, and Stay of Referral dated July 28, 2003). Therefore, the amounts previously withheld were proper.

The Secretary requests the Board find that the "maximum potential" amount for DMS and PCA fees are outstanding and due

"because Petitioners would have been expected to pay an amount that included these fees if [they] elected to resolve the debt by making payment in full to Treasury's PCA." (Supplement to Secretary's Statement, attachment, Supplemental Declaration of Lester J. West, hereinafter "West Decl.," para. 4). As binding authority for the DMS and PCA fees to be due, the Secretary cites the home improvement loan executed by Petitioners on July 23, 1996 which states:

If the Note Holder has required
[the Petitioners] to pay [the loan]
immediately in full as described above,
the **Note Holder will have the right
to be paid back by [Petitioners]
for all of its costs and expenses**
to the extent not prohibited by law. . .
(Secy. Stat., Exh. A, para. 4(d),
emphasis added).

Petitioners allege that the "penalties are unjustified." (Pet. Stat., para. 8). "The PCA is not entitled to any fees until collections are actually received" on the debt. (West Decl., para. 6, emphasis in original). The Board has not been advised of the precise amount the PCA has collected from Petitioners or the fee to which the PCA is entitled. The PCA "will be potentially entitled to this fee if the PCA collects the debt in full in the future." (West Decl., para. 7). (emphasis supplied) Therefore, the PCA fee is not presently legally enforceable or due.

ORDER

After due consideration of the record in this matter, I find the debt which is the subject of this proceeding to be legally enforceable against Petitioners in the amount of \$4,582.57, which excludes the PCA fee of \$1,598.39.

It is hereby **ORDERED** that the Secretary is authorized to seek collection of this outstanding obligation in the amount of \$4,582.57 plus interest by means of administrative wage garnishment in the amount of ten (10) percent of Petitioners' disposable income, without prejudice to the Secretary's right to seek recovery of this debt by means of administrative wage garnishment in a greater amount if, in the future, Petitioners' disposable income increases or Petitioners' monthly expenses decrease.

The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment is vacated.

David T. Anderson
Administrative Judge

July 30, 2004